

ALABAMA DEPARTMENT OF
ENVIRONMENTAL MANAGEMENT

IN THE MATTER OF

JOHNSON REALTY INC

OXMOOR LANDING

BIRMINGHAM, T19S, R3W, S6, 7

T19S, R4W, S1, 12

JEFFERSON COUNTY, ALABAMA

EXPIRED NPDES ALR161261 – ALHA01261

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FINDINGS

Pursuant to the provisions of the Alabama Environmental Management Act, Ala. Code §§ 22-22A-1 to 22-22A-16 (2006 Rplc. Vol.), the Alabama Water Pollution Control Act (hereinafter “AWPCA”), Ala. Code §§ 22-22-1 to 22-22-14 (2006 Rplc. Vol.), the ADEM Administrative Code of Regulations (hereinafter “ADEM Admin. Code r.”) promulgated pursuant thereto, and § 402 of the Federal Water Pollution Control Act, 33 U.S.C. § 1342, the Alabama Department of Environmental Management [hereinafter “Department”] makes the following FINDINGS:

1. Johnson Realty, Inc. (hereinafter “Operator”), is an Alabama corporation which is constructing the residential subdivision Oxmoor Landing (hereinafter “Facility”) located in T19S, R3W, S6, 7, T19S, R4W, S1, 12, on Tiger Walk, in Birmingham, Jefferson County, Alabama. Alvin Johnson is the official responsible for the Operator’s compliance with State and federal environmental laws and regulations. Sediment and other pollutants in stormwater runoff from the Facility have the potential to discharge and/or have discharged to Little Shades Creek, a water of the State, classified for Fish & Wildlife.

2. The following acronyms are used in this Order and, when used, shall have the meaning of the name or title referenced below.

BMPs	Best Management Practices
CBMPP	Construction Best Management Practices Plan
NOR	Notice of Registration
NOV	Notice of Violation
NPDES	National Pollutant Discharge Elimination System
QCI	ADEM-recognized Qualified Credentialed Inspector

QCP	ADEM-recognized Qualified Credentialed Professional
WL	Warning Letter

3. The Department is a duly constituted department of the State of Alabama pursuant to Ala. Code §§ 22-22A-1 to 22-22A-16 (2006 Rplc. Vol.).

4. Pursuant to ADEM Admin. Code rs. 335-6-12-.05(1) and 335-6-12-.11(1), the Operator is required to submit to the Department an NOR in order to register for and obtain NPDES coverage prior to commencing and/or continuing regulated disturbance activities.

5. On March 7, 2003, the Operator submitted to the Department an NOR requesting NPDES coverage under ADEM Admin. Code chap. 335-6-12 for regulated disturbance activities and discharges of treated stormwater from the Facility. The Department granted registration ALHA01261 to the Operator on March 7, 2003. Registration ALHA01261 expired on March 6, 2004.

6. On April 28, 2004, the Operator submitted to the Department an NOR requesting re-registration of NPDES coverage ALHA01261. The Department granted re-registration of ALHA01261 to the Operator on April 29, 2004. Registration ALHA01261 expired on March 6, 2005.

7. On February 22, 2005, the Operator submitted to the Department an NOR requesting re-registration of NPDES coverage ALR161261. The Department granted re-registration of ALR161261 to the Operator on February 22, 2005. Registration ALR161261 expired on March 6, 2006.

8. The Department inspected the Facility on February 14, 2008, May 16, 2008, and January 23, 2009, the Department documented that the Operator had not re-registered for and obtained NPDES coverage, although regulated disturbance activities and/or discharges were continuing.

9. Pursuant to ADEM Admin. Code r. 335-6-12-.05(2), all NPDES construction sites/activities and noncoal mining sites/activities less than five 5 acres in size in Alabama are required to fully implement and regularly maintain effective BMPs to the maximum extent practicable, and in accordance with the Operator's CBMPP that has been prepared by a QCP.

10. Pursuant to ADEM Admin. Code rs. 335-6-12-.05(3) and 335-6-12-.28, the Operator is required to ensure that comprehensive inspections of the Facility, offsite areas and stormwater conveyances, and associated receiving waters are conducted according to a prescribed schedule, after significant precipitation, and as often as needed by a QCP, to ensure that effective BMPs have been properly designed, implemented, and maintained. Each day there is activity at the Facility, the Operator or other qualified person is required to observe that portion of the Facility where construction disturbance has occurred and report any apparent BMP deficiencies to the Operator or QCP.

11. Pursuant to ADEM Admin. Code r. 335-6-12-.35(10)(a), the Operator is required to determine the nature, amount, and impact of a non-complying discharge, and remove, to the maximum extent practical, sediment and other pollutants deposited offsite or in any State water.

12. During the inspection of the Facility on February 14, 2008, the Department documented that the Operator had not properly implemented and maintained effective BMPs resulting in potential discharges of sediment and other pollutants in stormwater runoff to Little Shades Creek.

13. During the inspection at the Facility on February 14, 2008, the Department observed offsite accumulations of sediment resulting from discharges at the Facility.

14. On February 20, 2008, a WL was sent to the Operator by the Department as a result of the February 14, 2008, inspection. The WL notified the Operator of deficiencies documented at the Facility, and requested the Operator to submit a report detailing immediate and long-term corrective actions certified by a QCP within seven days of receipt of the WL. The Operator failed to submit the requested information.

15. The WL also requested the Operator to submit a compliance schedule and a copy of the CBMPP for the Facility prepared by a QCP with dates of corrective measures to be implemented within fifteen days of receipt of the WL. The Operator failed to submit the requested information.

16. In addition, the WL also requested that the Operator provide a follow-up response signed and certified by a QCP to the Department within thirty days after receipt of the WL. The Operator failed to submit the requested QCP certification.

17. During the inspection of the Facility on May 16, 2008, the Department documented that the Operator had not properly implemented and maintained effective BMPs resulting in potential discharges of sediment and other pollutants in stormwater runoff to Little Shades Creek.

18. During the inspection of the Facility on May 16, 2008, the Department observed offsite accumulations of sediment resulting from discharges at the Facility.

19. The Department issued an NOV on July 24, 2008, to the Operator as a result of the May 16, 2008 inspection. The NOV notified the Operator of deficiencies documented at the Facility and required the Operator to obtain NPDES registration coverage and to submit to the Department a report prepared by a QCP stating the actions taken on site to correct the noted deficiencies within thirty days of receipt of the NOV. As of May 11, 2009, a NOR requesting re-registration and the required QCP report certification had not been submitted to the Department.

20. During the inspection of the Facility on January 23, 2009, the Department documented that the Operator had not properly implemented and maintained effective BMPs resulting in potential discharges of sediment and other pollutants in stormwater runoff to Little Shades Creek.

21. During the inspection of the Facility on January 23, 2009, the Department observed offsite accumulations of sediment resulting from discharges at the Facility.

22. Pursuant to Ala. Code § 22-22A-5(18)c. (2006 Rplc. Vol.), in determining the amount of any penalty, the Department must give consideration to the seriousness of the violations, including any irreparable harm to the environment and any threat to the health or safety of the public; the standard of care manifested by such person; the economic benefit which delayed compliance may confer upon such person; the nature, extent and degree of

success of such person's efforts to minimize or mitigate the effects of such violations upon the environment; such person's history of previous violations; and the ability of such person to pay such penalty. Any civil penalty assessed pursuant to this authority shall not be less than \$100.00 or exceed \$25,000.00 for each violation, provided however, that the total penalty assessed in an order issued by the Department shall not exceed \$250,000.00. Each day such violation continues shall constitute a separate violation. In arriving at this civil penalty, the Department has considered the following:

A. SERIOUSNESS OF THE VIOLATIONS: The Operator did not ensure that effective BMPs were fully implemented and maintained resulting in the discharge of pollutants that could otherwise have been prevented and/or minimized. There is no evidence that the noted violations caused irreparable harm to the environment. There is no evidence that the noted violations were a threat to the health or safety of the public.

B. THE STANDARD OF CARE: While there are no known operational deficiencies, the Operator failed to keep the Operator's registration coverage current. The Operator did not implement and fully maintain effective BMPs at the Facility. The Operator did not exhibit a standard of care commensurate with applicable regulatory requirements.

C. ECONOMIC BENEFIT WHICH DELAYED COMPLIANCE MAY HAVE CONFERRED: The Department has been unable to ascertain if there has been a significant economic benefit conferred on the Operator by the Operator's failure to comply with applicable regulatory requirements and delayed response to the noted violations.

D. EFFORTS TO MINIMIZE OR MITIGATE THE EFFECTS OF THE VIOLATIONS UPON THE ENVIRONMENT: The Operator took little or no action to minimize or mitigate the effects of the noted violations upon the environment. There are no known environmental effects as a result of the alleged violations.

E. HISTORY OF PREVIOUS VIOLATIONS: The Operator has a history of previous violations as described in the Findings.

F. THE ABILITY TO PAY: The Operator has not alleged an inability to pay a civil penalty

G. OTHER FACTORS: Generally the violations fell into five broad categories of: 1) failure to implement and maintain effective BMPs; 2) sediment deposition/accumulation off-site; 3) failure to maintain NPDES registration coverage; 4) operating without a NPDES registration coverage; and 5) inadequate response to previous enforcement which have historically received penalty amounts of 1) \$100.00 to \$5,000.00 per day, 2) \$100.00 to \$10,000.00 per day, 3) \$100.00 to \$10,000.00, 4) \$100.00 to \$10,000.00 per day and 4) \$100.00 to \$25,000.00per day.

ORDER

Based on the foregoing FINDINGS and pursuant to Ala. Code §§ 22-22A-5(10), 22-22A-5(12), 22-22A-5(18), and 22-22-9(i) (2006 Rplc. Vol.), it is hereby ORDERED:

A. That, within forty-five days after receipt of this Order, the Operator shall pay to the Department a civil penalty in the amount of \$69, 600.00 for the violations cited herein. Said penalty shall be made payable to the Alabama Department of Environmental Management by certified or cashier's check and shall be remitted to:

Office of General Counsel
Alabama Department of Environmental Management
PO Box 301463
Montgomery, Alabama 36130-1463

B. That, immediately upon receipt of this Order and continuing thereafter, the Operator shall take immediate action to prevent/minimize to the maximum extent practicable sediment and other pollutants in stormwater leaving the Facility, prevent noncompliant and/or unpermitted discharges of pollutants to waters of the State, and ensure full compliance with the requirements of ADEM Admin. Code chap. 335-6-12.

C. That, the Operator shall ensure that:

1. all inspections/evaluations shall be performed by a QCP/QCI;
2. BMP implementation and maintenance, and other corrective/remediation activities, shall be performed under the direct supervision of a QCP/QCI, and shall be certified by QCP;
3. all applications, plans, and information shall be certified by a QCP;

4. all submittals to the Department shall comply with applicable Department regulations and shall be signed by the Operator and certified by a QCP; and
5. all applications, plans, reports, and other submittals to the Department shall indicate who prepared the submittal, who conducted and/or supervised the inspection/work including his or her QCP/QCI designation, how the inspection/work was conducted, and the results of the inspection/work.

D. That, within five days after receipt of this Order, the Operator shall have a comprehensive inspection performed of the Facility, offsite conveyances, and affected State waters.

E. That, within ten days after receipt of this Order, the Operator shall submit to the Department a complete modified/updated NPDES registration, including the required fee, for the Facility.

F. That, within thirty days after receipt of this Order, the Operator shall submit to the Department a CBMPP detailing effective BMPs to be implemented to prevent/minimize to the maximum extent practicable sediment and other pollutants in stormwater leaving the Facility, and ensure full compliance with the requirements of ADEM Admin. Code chap. 335-6-12.

G. That, within thirty days after receipt of this Order, the Operator shall submit to the Department a detailed plan for the remediation and/or removal of any sediment and other pollutants from the Facility deposited offsite and in State waters.

H. That, within ninety days after receipt of this Order, the Operator shall fully implement effective BMPs, implement all plans required by this Order, and correct all deficiencies at the Facility, offsite conveyances, and affected State waters, including sediment removal/remediation in a manner acceptable to the Department.

I. That, within 120 days after receipt of this Order, the Operator shall submit to the Department a certification that effective BMPs have been implemented, all deficiencies have been corrected, and full compliance with the requirements of ADEM Admin. Code chap. 335-6-

12 has been achieved at the Facility, offsite conveyances, and affected State waters, including sediment removal/remediation in a manner acceptable to the Department.

J. That, should the Operator be unable to meet a deadline set forth herein, the Operator may request a modification of said deadline if the delay is due to a *Force Majeure*. A *Force Majeure* is defined as any event arising from causes that are not foreseeable and are beyond the reasonable control of the Operator, including the Operator's contractors and consultants, which could not be overcome by due diligence (i.e., causes which could have been overcome or avoided by the exercise of due diligence will not be considered to have been beyond the reasonable control of the Operator) and which delays or prevents performance by a date required by the Order. Events such as unanticipated or increased costs of performance, changed economic circumstances, normal precipitation events, or failure to obtain federal, state, or local permits shall not constitute *Force Majeure*. Any request for a modification of a deadline must be accompanied by the reasons (including documentation) for each extension and the proposed extension time. This information shall be submitted to the Department a minimum of ten working days prior to the original required completion date. If the Department, after review of the extension request, finds the work was delayed because of conditions beyond the control and without the fault of the Operator, the Department may extend the time as justified by the circumstances. The Department may also grant any other additional time extension as justified by the circumstances, but the Department is not obligated to do so.

K. That should any provision of this Order be declared by a court of competent jurisdiction or the Environmental Management Commission to be inconsistent with federal or State law and, therefore, unenforceable, the remaining provisions herein shall remain in full force and effect.

L. That except as otherwise set forth herein, this Order is not and shall not be interpreted to be a permit or modification of an existing permit under federal, State or local law, and shall not be construed to waive or relieve the Operator of the Operator's obligations to comply in the future with any permit coverage.

M. That the issuance of this Administrative Order does not preclude the Department from seeking civil penalties, criminal fines or other appropriate sanctions or relief against the Operator for the violations cited herein.

N. That failure to comply with the provisions of this Administrative Order shall constitute cause for commencement of legal action by the Department against the Operator for recovery of additional civil penalties, criminal fines, or other appropriate sanctions or relief.

ORDERED and ISSUED this _____ day of _____, _____.

Onis "Trey" Glenn, III, Director
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Montgomery, AL 36110-2059
(334) 271-7700